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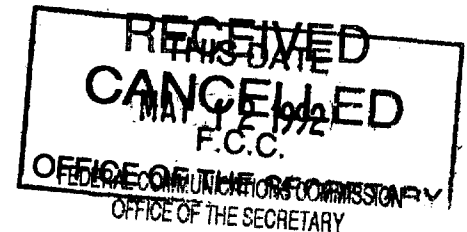
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June 12, 1992

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554



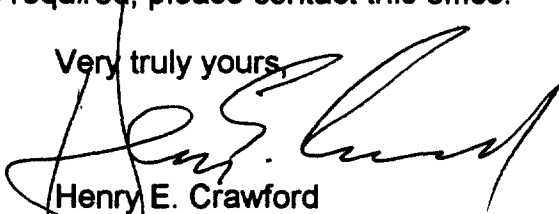
Re: Review of the Commission's Regulations and Policies
Affecting Investment in the Broadcast Industry
MM Docket No. 92-51

Dear Ms. Searcy:

Transmitted herewith on behalf of Minority Broadcast Investment Corporation ("MBIC") are an original and nine (9) copies of MBIC's Comments in the above-captioned proceeding as directed to the Commission.

Should any additional information be required, please contact this office.

Very truly yours,


Henry E. Crawford
Counsel for
Minority Broadcast Investment
Corporation

cc: Mr. Walter L. Threadgill

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Before The FEDERAL COMMUNICATIONS COMMISSION
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Federal Communications Commission
Washington, D.C.

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In the Matter of)
)
Review of the Commission's) MM docket No. 92-51
Regulations and Policies)
Affecting Investment)
in the Broadcast Industry)

To: The Commission

COMMENTS OF MINORITY BROADCAST INVESTMENT CORPORATION

Minority Broadcast Investment Corporation ("MBIC")¹, by counsel, in response to a Notice of Proposed Rule Making and Notice of Inquiry ("NPRM&NOI") hereby submits its comments in the above-captioned proceeding.

I. INTRODUCTION

1. On April 1, 1992, the Commission released the NPRM&NOI seeking comment on ways of reducing regulatory restraints on investment in the broadcast industry. One proposal was to expand the class of investors eligible for passive institutional status to include MESBICs.² That change in status would allow MESBICs to participate in broadcast ventures up to the newly proposed benchmark of 20% without being charged with having an attributable interest.

¹ MBIC is a Specialized Small Business Investment Company ("SSBIC") involved in providing capital to minority broadcast ventures. The Small Business Administration considers SSBICs and Minority Enterprise Small Business Investment Companies ("MESBICs") as being interchangeable. Consequently, what is said here concerning MESBICs is to be understood as applying equally to SSBICs.

² NPRM&NOI, ¶ 11, p. 5.

2. MBIC applauds the Commission's proposal to allow MESBICs to own a larger nonattributable interest in broadcast ventures. Additionally, in response to the Commission's invitation to submit variations on proposals made in the NPRM&NOI, MBIC further proposes that MESBIC participation in new broadcast comparative hearings be shielded from two FCC doctrines which directly undercut minority entrepreneurs in such proceedings: 1) the "sham" application theory, and 2) the so-called "accommodation letter" doctrine. Without calling into question the general soundness of these two doctrines, it is respectfully submitted that exposure to these two legal theories inhibit MESBICs from participating in new broadcast ventures to the detriment of minority applicants and the public at large.

II. ARGUMENT

A. MESBICs Should be Afforded Passive Institutional Status

3. MESBICs have not been afforded passive institutional status in the past because it was believed that security in the ventures they were funding could be obtained by non-attributable equity interests such as non-voting stock and stock warrants.³ However, as noted in the NPRM&NOI, minority ownership of broadcast properties has persistently failed to increase in terms of total percentage of ownership.⁴

4. Affording MESBICs institutional passivity will give them an overall flexibility to participate in broadcast ventures. Since MESBICs fund only minority controlled entities, the net effect will be to make more capital available for use by minority controlled broadcast companies. Additionally, as pointed out

³ NPRM&NOI, n. 19, p. 6.

⁴ Id.

in the NPRM&NOI,⁵ the measure of control that can be exercised by MESBICs is regulated by the Small Business Administration. Consequently, the Commission's traditional concern with influence over station content is not a factor.

5. In sum, providing MESBICs with passive institutional status will result in greater availability of capital without triggering countervailing concerns regarding substantive control or influence over the financed facility.

B. MESBICs Should be Shielded from Inappropriate FCC Doctrines in Comparative Hearings for New Broadcast Facilities

1. The "Sham" Application Doctrine

6. The Commission has long held the goal of increasing minority participation in the broadcast industry. That goal was articulated in Minority Ownership and Broadcasting, 92 FCC 2d 849 (1982) where the Commission recognized that specially structured and financed entities such as limited partnerships could be an ideal vehicle for:

[I]ncreasing minority opportunities by enabling minority entrepreneurs to capitalize their broadcasting ventures by attracting and utilizing the investments of others to a greater extent.

Minority Ownership and Broadcasting, 92 FCC 2d 849 at 855.

7. Since the announcement of this goal in 1982, a corresponding doctrine has arisen in comparative hearing cases involving new applicants for broadcast facilities.⁶ Essentially, that doctrine allows competitors of minority

⁵ NPRM&NOI, ¶ 11, p. 6.

⁶ The doctrine evolved out of the seminal case of KIST Corp., 99 FCC 2d 173 (1984). For a modern interpretation of the doctrine see Royce International Broadcasting, 5 FCC Rcd 7063 (1990).

applicants to charge that applicant with being a "sham"⁷ or "front" for non-minority investors. The growth of this doctrine, which singles out minority applicants who do not possess sufficient funds on their own to file as individuals, has resulted in untold hours of litigation over who is "really" going to run the proposed facility. Additionally, it has greatly inhibited investors from financing minority applicants because of the extra risk and litigation involved in the inevitable claim that such investors are really just perpetrating a "sham" application.

8. Setting aside the general soundness of this doctrine, it should not be used against minority applicants who propose financing by properly organized and regulated MESBICs, purely by virtue of the fact that such financing has been obtained. As mentioned above, MESBICs are regulated entities with very limited ability to exercise substantive influence over the ventures financed. To the extent that such "influence" is provided, it is generally in the area of training and assistance in making sure that the venture is stable from an economic standpoint. It would be contrary to any notion of sound public policy to deny fledgling minority entrepreneurs such assistance.

9. In spite of the above, applicants in comparative hearings have sought to reduce the integration credit of competitors on the basis of MESBIC financing and have, in particular, questioned the passivity of MESBIC stock warrants.⁸ Therefore, MBIC proposes that for purposes of assessing integration

⁷ Cf., Evansville Skywave, Inc., FCC 92-76, released February 28, 1992 (Commission suggests that the term "sham" should be avoided because of the potential for ambiguity and confusion).

⁸ See, e.g., Marc A. Albert, FCC 91D-60, released December 6, 1991, ¶¶ 128-129, p. 17 (competing applicants claim that nonvoting MESBIC stock warrants should reduce minority applicant's integration credit); Gloria Bell Byrd, FCC 92D-32, released May 5, 1992, Proposed Findings of Fact and Conclusions of Law of Gloria Bell Byrd, pp. 59-60 (Broadcast Capital Fund, Inc. charged for reduced integration by competing applicant based on standard stock warrant).

credit in comparative hearings for new broadcast licenses MESBICs be deemed absolutely passive.

10. In sum, affording MESBICs absolute passivity in terms of integration credit in comparative hearings will encourage MESBICs to fund new applicants for broadcast facilities and result in a solid source of financing for new minority entrepreneurs in broadcasting. Moreover, needless litigation over "sham" issues will be reduced considerably since applicants will not have this tool for reducing the integration credit of MESBIC financed competitors. Therefore, MBIC respectfully submits that MESBICs be deemed entirely passive for purposes of awarding integration credit in comparative hearings for new broadcast facilities.

2. The "Accommodation Letter" Doctrine

11. Paralleling the growth of the "sham" application doctrine is the "Accommodation Letter" doctrine.⁹ Here, competitors engage in intense legal argument and invoke razor fine distinctions to make the claim that the language of a competitor's financial letter does not really offer the financing stated on its face but is merely an "accommodation" to the applicant. Again, without taking sides on the merits of this legal doctrine, MBIC respectfully submits that a commitment letter issued by a properly organized MESBIC should be considered *prima facie* evidence of reasonable assurance that the funds will be made available to the applicant for purposes of funding the construction and operation of the proposed broadcast facility.

12. Since it is the purpose of a broadcast MESBIC to provide funds for new minority owned broadcast facilities, it cannot seriously be argued that a

⁹ Dutchess Communications Corp., 101 FCC 2d 243, 248 (Rev. Bd. 1885).

commitment letter from a MESBIC to fund the construction of a new minority owned station is a mere "accommodation." Nevertheless, in their zeal to attack their comparative opponents, applicants have made the charge that a commitment from a *bona fide* MESBIC was not truly for the purpose of constructing the station but only offered as an "accommodation."¹⁰ This sort of litigation is a waste of public and private resources and should be prevented by the Commission. Again, the cost involved in litigating an "accommodation letter" issue discourages MESBICs from their rightful mission of making such commitments.

13. The accommodation letter doctrine as applied to MESBIC financial commitments inhibits the growth of minority owned facilities by discouraging a good and necessary source of financing for new broadcast facilities. Therefore, MBIC respectfully submits that commitment letters issued by properly organized and regulated MESBICs be considered *prima facie* evidence of reasonable assurance to be disputed only in cases where the commitment letter clearly and distinctly reveals a lack of commitment on the part of the lending MESBIC.

III. CONCLUSION

14. The percentage of minority owned broadcast facilities remains persistently small. One remedy is to provide ready capital for minority controlled enterprises through MESBIC financing. However, at present, MESBICs are not afforded passive institutional status and are also inappropriately vulnerable to the Commission's "sham" application and "accommodation letter" doctrines. In order to reverse this trend, the Commission needs to 1) cloak MESBICs with passive institutional status, 2) deem MESBIC participation in a new broadcast

¹⁰ See, e.g., Marc A. Albert, *supra*, ¶ 117, p. 15.

venture to be absolutely passive for purposes of awarding integration credit and
3) find MESBIC commitment letters to be *prima facie* evidence of reasonable
assurance of financing a proposed broadcast facility.

15. MBIC submits that adoption of the above proposals will greatly
enlarge the number of bona fide minority applicants and stimulate growth in the
overall minority ownership of broadcast facilities.

WHEREFORE, Minority Broadcast Investment Corporation respectfully
requests that its proposals herein be granted.

June 12, 1992

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Respectfully Submitted,

Minority Broadcast Investment
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By: 

Henry E. Crawford

Its Attorney